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No. 79-487

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK P. RINALDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the court of appeals incorrectly held that the government's failure to produce Jencks Act material was harmless error as to the first count of the indictment.

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted on two counts of willfully attempting to evade and defeat income taxes for 1971 and 1972, in violation of 26 U.S.C. 7201. The district court sentenced petitioner to concurrent five-year prison terms, and ordered him to pay a $10,000 fine on both counts. The court of appeals reversed petitioner's conviction on the 1972 count but affirmed with respect to the 1971 count (Pet. App. 1a-5a).

The government's proof at trial showed that petitioner owned a sole proprietorship, Rinaldi Investment Company, that was in the business of lending money at high rates of interest to individuals who could not obtain

conventional financing. The government demonstrated that petitioner had failed to report on his tax returns the following items of income that he had received in 1971 and 1972 (Pet. 13-14):

	1971	1972
1. Assignment of income from Frank Rinaldi, Jr.	$3,040.00	
2. Tailored clothing received from Globe Corp. (Hamilton Tailoring Co.)	$7,368.04	
3. Automobile from Springfield Lincoln Mercury	$1,500.00	$750.00
4. Dental work received from McCabe & Pence	$3,670.00	
5. Unreported interest on loan to Burton Signer	$ 600.00	
6. Unreported payments received from George Younes		$9,098.42
7. Antiques received from George Younes		$4,235.00
8. Unreported interest received from Norman Lillie	$3,500.00	$ 500.00

The Jencks Act material at issue is the grand jury testimony of George Younes (who was involved in items 6 and 7 listed above). At the completion of the government's direct examination of Younes, petitioner's counsel requested Younes' grand jury testimony. The

prosecutor responded that he had no transcript of Younes' testimony and that it was his recollection that it had never been recorded (Younes: 46-48).[1] After the trial, the government discovered that Younes' grand jury testimony had in fact been recorded. It ordered the testimony transcribed and thereafter furnished a copy of the transcription to petitioner (Pet. App. 3a).

On petitioner's motion for a new trial, the trial court held that the government's failure to turn over a transcript of Younes' grand jury testimony at the appropriate time violated the Jencks Act. The court found, however, that the violation was harmless error because "the trial testimony and the grand jury testimony of Mr. Younes [were] essentially consistent and * * * the defendant is grasping at straws" (Opinion of trial court, filed August 25, 1978, at 9).[2]

The court of appeals reversed petitioner's conviction as to 1972. It held that the fact that the parties differed as to whether Younes' grand jury testimony was consistent with his trial testimony precluded characterizing the Jencks Act violation as harmless error (Pet. App. 4a). After reviewing the entire trial record, however, the court affirmed petitioner's conviction as to 1971 because any claim of prejudice with respect to that count was "altogether too attenuated" to warrant a reversal (Pet. App. 5a).

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[1] "Younes:" refers to the separately-paginated transcript containing only the testimony of George Younes. "Tr." refers to the remainder of the trial transcript.

[2] We are lodging a copy of the trial court's opinion with the Clerk.

Petitioner contends that the court of appeals erred in holding that his Jencks Act claim for 1971 was "altogether too attenuated." Although Younes' testimony concerned events that occurred in 1972, petitioner argues that it also related to the 1971 charge because Younes testified concerning 1971 dealings between petitioner and government witness Norman Lillie (Pet. 14). But the few brief references to Lillie in Younes' testimony (Younes: 3-7, 48, 60) at most merely confirmed that petitioner had lent money to Lillie, a fact that the defense had readily acknowledged at trial (see, *e.g.*, testimony of defense accountant Mayer comparing petitioner's records of his loans to Lillie with Lillie's records of those loans (Tr. 458-467)).

Petitioner also argues that the 1971 conviction is tainted because "there was no bifurcation of the evidence or cleavage between the two years in question" (Pet. 15). But the trial court gave the jury thorough instructions that it had to consider the evidence on each count separately from the evidence on the other count.[3] It is therefore apparent that even on the unlikely assumption that Younes' testimony could have been fully discredited

[3]The court's instructions were as follows (Tr. 508, 514):

> Failure to comply with the requirements of the Internal Revenue Code for one year is a separate offense from such failure to comply for a different year. Defendant's tax obligation in any one year must be determined separately from his tax obligation in any other year.
>
> * * * * *
>
> The charge as set forth in each count of the indictment constitutes a separate and distinct offense. You must consider each count and the evidence applicable to each count separately, and you must state your findings as to each count uninfluenced by your verdict on the other count. And the defendant may be found guilty or not guilty of one or both of the crimes charged.

by the cross-examination of a defense counsel properly armed with Younes' grand jury transcript, that discreditation would have had no effect on petitioner's conviction for tax evasion in 1971. Accordingly, the court of appeals correctly held that the Jencks Act violation here was harmless error as to the 1971 count of the indictment. See *Goldberg* v. *United States*, 425 U.S. 94, 111 n.21 (1976); *United States* v. *Beasley*, 576 F. 2d 626, 633 (5th Cir. 1978), cert. denied, No. 78-5223 (March 5, 1979); *United States* v. *Weidman*, 572 F. 2d 1199, 1207-1208 (7th Cir.), cert. denied, 439 U.S. 821 (1978).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[4]Petitioner also argues (Pet. 15-17) that the government's failure to turn over Younes' grand jury testimony violated his right to due process, citing this Court's statement in *United States* v. *Agurs*, 427 U.S. 97, 106 (1976), that "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." But it is apparent from the context of that statement, and from the Court's reliance on *Brady* v. *Maryland*, 373 U.S. 83 (1963), that the Court's reference there was to information tending to exculpate the accused. Here, on the other hand, Younes' grand jury testimony did not exculpate petitioner with respect to either 1971 or 1972. The government's failure to turn over the transcript therefore did not constitute a due process violation.

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